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CPLR 203(b)(4): Delivery of Summons to Foreign Sheriff Does Not Extend Statute of Limitations

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The time a cause of action accrues has been defined as the time at which a plaintiff is first able to maintain the action.⁴ The *Lewis* court was quick to perceive that plaintiff could not have maintained the action during the decedent's life, since she was entitled to receive the proceeds from the policy only upon his death. An action sought to be maintained upon the cancellation of the policy in 1956 would have been premature since plaintiff had not then been injured by the breach, and decedent could have made other arrangements before his death to ensure that plaintiff received the amount of money that would have been due under the policy. The plaintiff's action, although instituted twelve years after the breach, was therefore timely.⁵

CPLR 203(b)(4): Delivery of summons to foreign sheriff does not extend statute of limitations.

The statute of limitations governing any claim may be extended sixty days if the summons is delivered to a proper sheriff pursuant to CPLR 203(b)(4) before the expiration of the designated period.⁶ When the defendant is a corporation, the "proper sheriff" is one in a county in which the corporation may be served. It is readily apparent that failure to comply with the statute may be a grievous error when the limitation period has nearly expired.

In *Butler v. UBS Chemical Co.*,⁷ the plaintiff attempted to avail himself of this sixty-day extension. However, the defendant was a foreign corporation which, while transacting business in New York, had its offices in Newark, New Jersey; and plaintiff had delivered the summons to a New Jersey sheriff. The Appellate Division, First Department, reversing the order of the trial court, declared that delivery to a *foreign* sheriff does not invoke the extension; service upon the defendant had therefore been effected without the three year period governing personal injury actions,⁸ and the cause of action was barred.

⁴ Cary v. Koerner, 200 N.Y. 253, 93 N.E. 979 (1910).

⁵ It is clear that the court was not employing a "discovery of the breach" theory since the statute of limitations began to run upon decedent's death. Plaintiff's knowledge of the breach was immaterial in this regard. Cf. CPLR 206(c); CPLR 213(5) & (7); CPLR 214(7).

⁶ Delivery to a "proper sheriff" beyond the expiration of the controlling statute is, of course, ineffective. *Manse Builders Inc. v. Northrup*, 186 Misc. 839, 60 N.Y.S.2d 30 (Sup. Ct. Monroe County 1946). And delivery to the wrong sheriff is also ineffective. *Guilford v. Brody*, 237 App. Div. 726, 262 N.Y.S. 722 (1st Dep't 1933). However, the proper sheriff need not serve the summons himself; any person qualified to serve the summons under the CPLR may do so. *Cohoes Bronze Co. v. Georgia Home Ins. Co.*, 243 App. Div. 224, 276 N.Y.S. 619 (3d Dep't 1935).

⁷ 32 App. Div. 2d 8, 299 N.Y.S.2d 247 (1st Dep't 1969).

⁸ CPLR 214.

Practitioners are well advised to examine the exact nature of the defendant over whom jurisdiction is sought, since the result in *Butler* could easily have been avoided by employing an alternative means of service designed specifically for that type of situation.⁹

CPLR 217: Ambiguous "final and binding determination" resolved against administrative body.

CPLR 217 establishes a four month period within which a proceeding against a body or officer pursuant to CPLR article 78 must be commenced.¹⁰ The period commences when the determination of the body or officer becomes final and binding upon a petitioner—a time which is not always easily ascertainable. In *Castaways Motel v. Schuyler*,¹¹ the question as to when one such determination became final and binding was presented to the New York Court of Appeals.

Petitioner therein had applied for a grant of land adjacent to its own property but located under the Niagara River. The consent of respondent, the Commissioner of General Services, to proceed with the contemplated work while the application was pending was subsequently sought, because although it was urgent that the project be completed immediately, the time necessary for processing the application was somewhat lengthy. Consent having been finally obtained, the petitioner expended a considerable sum in constructing a bulkhead around the land.

Meanwhile, the application proceeded "swiftly" through the administrative morass. Pursuant to the Public Lands Law,¹² the New York State Power Authority notified respondent that the grant would be permissible. However, he was further advised that a covenant of release from the petitioner would be required, and that such covenant would release the state and the authority from all past and future claims.

Petitioner was first informed of the covenant and its nature in a letter, dated October 20, 1966, which requested him to execute the release. Counsel was consulted, and the Chief of the Bureau of Surplus Real Property was informed of petitioner's willingness to sign a release for any past claims, but that it would not give a *carte blanche* release for all future claims. In response to its letter petitioner was informed,

⁹ See N.Y. BUS. CORP. LAW §§ 304, 307 (McKinney 1963).

¹⁰ It should be noted, however, that shorter limitation periods provided elsewhere remain effective. CPLR 217. The court may extend the period of two years if petitioner is under a disability specified in CPLR 208. *Id.* See also 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 217.01 (1963).

¹¹ 24 N.Y.2d 120, 247 N.E.2d 124, 299 N.Y.S.2d 148 (1969).

¹² N.Y. PUB. LANDS LAW § 75(13) (McKinney 1951).